Nos. 82-1349 and 82-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,
v.
S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES),
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
EMMA ROSA MASCHER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
UNITED SCOTTISH INSURANCE CO., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT VARIG AIRLINES

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QUESTIONS PRESENTED

1. Whether the United States can be held liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, for the negligence of Federal Aviation Administration ("FAA") employees in reviewing and inspecting, for type certification purposes, the design of a commercial transport category aircraft which did not comply with mandatory FAA fire protection safety regulations, where a private person in similar circumstances would be held liable under the "Good Samaritan" doctrine of the applicable state law.

2. Whether the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars claims based on the FAA's negligent review and inspection, for type certification purposes, of commercial transport category aircraft, where the FAA engineers and inspectors approved an aircraft design that did not comply with detailed, mandatory FAA fire protection safety regulations, and the noncompliance was both obvious and substantial.

3. Whether the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars claims based on the FAA's negligent review and inspection, for type certification purposes, of the design of commercial transport category aircraft.

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Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in opposition to the brief on the merits filed by the United States of America.[1]

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[1] VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

STATEMENT OF THE CASE

The government's brief conspicuously avoids any real discussion of the actual facts in the record of the *Varig* case. Since the issues presented depend heavily on the facts, VARIG believes that a fuller discussion of the considerable evidence in the record below is essential to a proper disposition of the case.

A. Facts of the VARIG Crash

On July 11, 1973, VARIG's Flight 820 took off from Rio de Janeiro for a scheduled eleven-hour nonstop flight to Paris.[2] The aircraft was one of VARIG's 707 jet aircraft manufactured by Boeing, bearing Registration No. PP-VJZ. The flight progressed without incident until a few minutes before landing at Orly Airport, when a passenger exited from an aft lavatory of the aircraft and reported smoke to the flight attendants. Within the scope of four to six minutes, an in-flight fire on board the aircraft in one of the aft lavatories reached such intensity that it caused thick, black smoke to roll forward from the extreme aft section of the aircraft through both passenger cabins into the cockpit. Within moments, the smoke was so dense that cabin crew members could not see the exit windows, or the passengers; and the pilots could see neither each other nor any of their flight instruments. As a result, the pilots opened the sliding windows in the cockpit and stuck their heads out into the windstream in order to make a crash landing into a field just a few miles from Orly Airport.

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[2] Because the aircraft crashed in France, the official accident investigation came under the jurisdiction of a French Commission of Inquiry. Rudolf Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board, was assigned to the French Commission as the Accredited Representative of the United States. Mr. Kapustin's deposition testimony and the exhibits introduced during his deposition, including the Final Report of the French Commission, establish the facts set forth in the text concerning the crash. The Final Report is included in the Joint Appendix ("J.A.") at 49-98.

When the plane came to a stop in the field only six minutes after the smoke was first discovered, most of the people in the plane were unconscious or dead from asphyxiation or toxic gases. Seven crew members and one hundred seventeen passengers—a total of 124 persons—died in the crash. The aircraft—valued at six million dollars—was totally destroyed.

B. Accident Investigation and Probable Cause of the VARIG Crash

The official accident investigation was conducted by the French Commission of Inquiry with the assistance of Mr. Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board ("NTSB"), who took part in preparing the Commission's official Final "Probable Cause" Report, which was issued on April 6, 1976. (Kapustin deposition, Exhibits 30, 31, J.A. 49-98). This Final Report concludes that "[t]he probable cause of the accident is a fire which appears to have broken out in the sink unit of the rear starboard lavatory . . . . The fire could have been caused by either an electrical incident or by passenger carelessness." (J.A. 98). Mr. Kapustin testified that he agreed with this "probable cause" conclusion, and with the view that the fire probably started in the towel disposal area located in the sink unit of the aft lavatory. (Kapustin deposition at 1204-06, J.A. 127-28). In the district court the government admitted for purposes of its summary judgment motion that "the fire did originate in the lavatory waste container." [3]

As part of the accident investigation, Mr. Kapustin observed VARIG's voluntary teardown of the aft lavatories of an identical "sister ship" to PP-VJZ (Kapustin deposition at 698-875). The teardown was documented by a series of photographs, which Mr. Kapustin identified at his deposition. (Exhibits 25.1-25.56). Six of the exhibits

[3] United States' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, at 6.

(Nos. 25.6, 25.10, 25.11, 25.28, 25.44 and 25.45) are included in the Appendix of Photographic Exhibits ("Photo App.") filed with this Court. Exhibit 25.6 shows the interior of the starboard aft lavatory before the teardown began. (Kapustin deposition at 740-41, J.A. 119). The item circled on the photograph and marked as RK 56 was identified by Mr. Kapustin as the spring-loaded waste towel disposal door. According to Mr. Kapustin's testimony, waste towels and other papers are deposited through this spring-loaded door by passengers using the aircraft's lavatory. These waste towels do not fall into an enclosed metal container under the sink. Instead, they fall into an open area located under the sink and behind a service door (RK 63, Exhibit 25.6). At the bottom of this open area is a removable box with no top or cover (RK 71, Exhibit 25.10) into which the waste towels are supposed to drop. This open area under the sink also contains the hot water heater (RK 72, Exhibit 25.11), the electrical connections leading to it (RK 75), a box containing electrical connections (RK 78), a wire bundle (RK 79), and the plumbing to the sink. Mr. Kapustin and the other accident investigators determined that during crowded flights this entire open area beneath the sink could be filled with used, dried-out paper towels that would be in direct contact with the water heater and the other electrical wires and components in that area. (Kapustin deposition at 792-93, J.A. 119-20).

According to the Final Report of the French Commission, in "this particular accident, involving a long flight (11 hours) with almost total occupancy of the tourist class section (97 passengers out of 109 available seats), it can rightly be supposed that the space used to dispose of papers [*i.e.*, the open area under the sink] was full." (J.A. 91). In addition, the accident investigators learned that cigarette butts are frequently found in the towel disposal area during cleaning operations at the end of a flight. (Kapustin deposition at 1041, J.A. 126).

As the teardown of the sister ship's lavatory progressed, the investigators could see that the sink and

cabinet module is installed into the aircraft as a single unit (RK 99, Exhibit 25.28). Behind the sink and cabinet module an airspace exists between the aircraft bulkhead and the lavatory unit (RK 104, Exhibit 25.28), which Mr. Kapustin and the other accident investigators concluded could produce a chimney effect in the event of a lavatory fire. (Kapustin deposition at 844, J.A. 120). The investigators also noted that flexible rubber tubing running through the module supplies air to the lavatory air vent. (RK 60, Exhibit 25.6). Mr. Kapustin testified that if this tube burned through it would "open an air supply to the back of the compartment," and would "add oxygen and would aggravate a fire." (Kapustin deposition at 853, 856, J.A. 120).

When the investigators removed the sink and cabinet module from the aircraft bulkhead and observed the back of the unit, they saw a number of holes in it. (RK 123-25, Exhibit 25.44; RK 126, Exhibit 25.45) (Kapustin deposition at 904-16, J.A. 121-25). As part of his investigation, Mr. Kapustin attempted to ascertain the purpose of these holes and to determine whether the holes made the towel disposal area of the sink and cabinet something less than air-tight. He testified that the towel disposal area of the sink and cabinet unit could not contain a trash fire and that fire or smoke probably would come out of the holes in the back of the unit if a fire started in the towel disposal area. (Kapustin deposition at 915-17, J.A. 125). Mr. Kapustin went to Mr. Hall, a Boeing representative, in an attempt to ascertain the purpose of these holes, but no one at Boeing was "quite certain what the purpose of the holes—what they were there for." (Kapustin deposition at 936-37, J.A. 125; *see also* Nelson deposition at 121-23, J.A. 128-29).

Mr. Kapustin also attempted to determine whether the design of the lavatory sink unit complied with the FAA's Federal Aviation Regulations ("FARs") and their predecessors, the Civil Air Regulations ("CARs"). For present purposes, the most critical regulation is CAR

4b.381(d), which was identified by Mr. Kapustin as being in effect at the time the Boeing 707 was issued a Type Certificate by the FAA. (Kapustin deposition at 715-18, J.A. 118-19). CAR 4b.381(d) provides in pertinent part as follows:

FIRE PROTECTION

§ 4b.381 *Cabin Interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

. . . .

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

Mr. Kapustin testified in unequivocal terms that the towel disposal area in the 707 lavatory sink unit did *not* comply with CAR 4b.381(d):

Q. [By counsel for VARIG] Directing your attention to Exhibit 22.8, which is the section 4b.381(d). . . . I would like to ask you in what regard did the aft lavatory trash container area of the 707's, such as operated by VARIG, fail to comply with that section, in your opinion?

. . . .

A. [By Mr. Kapustin] Well, sir, the compartment, as such, did not, first of all, contain any—*it was not a container.* It was strictly a compartment into which the wastepaper material was allowed to fall when it was introduced by the flapper door that's up on top of the module.

Number 2, *the area, in itself,* if this were to be a container, *contained flammable material,* such as the plastic tubing for the water drains, the door, the large door, was of a wood composition material, which although it could have been fire-resistant to a degree, contained fabric, trim, which was not.

The entire compartment had large holes in it. These holes, even though they wore a cover which was airtight, would have made the entire compartment non

air-tight and completely incapable of containing any fire or smoke.

. . . .

Q. Mr. Kapustin, in connection with the words in that regulation that refer to receptacles, "and shall incorporate covers or other provisions for containing possible fires," did you reach a conclusion as to whether or not this trash container area incorporated such a cover, or other provisions, that's referred to in that regulation.

. . . .

A. Yes, sir.

Q. What was your conclusion in that regard?

A. *That there is no cover.* There's a flapper door, that was opened to put the wastepaper into the container, *but there was no cover, as such.*

(Kapustin deposition at 1065, 1069-72, J.A. 126-27, emphasis added).

Later in his deposition, Mr. Kapustin reiterated his view that the lavatory sink unit "was not capable of containing fire or smoke;" that no "expert evaluation" was needed because "[i]t was a simple open and shut situation, that the compartment did not meet the requirements;" and that "the compartment was full of holes and air spaces, and simply could not, *by any stretch of the imagination*, be considered capable of containing a fire if a fire were to occur in that compartment." (Kapustin deposition at 1597, 1625, J.A. 128, emphasis added).

As a result of Mr. Kapustin's investigation, the NTSB issued certain "Safety Recommendations"[4] which included a recommendation to the FAA that it "reevaluate certification compliance with section 4b.381(d) of the Civil Air Regulations on Boeing 707 series aircraft."

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[4] NTSB Safety Recommendations A-73-67 through A-73-70, dated September 5, 1973. (J.A. 108-09).

The FAA, which is required by statute [5] to respond to the NTSB's Safety Recommendations, conducted an investigation into the compliance, for type certification purposes, of the Boeing 707 with applicable federal regulations, including CAR 4b.381(d). This investigation was conducted by Richard Nelson, an FAA airworthiness engineer, who went to Brazil to participate in the teardown of PP-VJZ's sister ship and to Seattle, Washington, to review the type certification file on the Boeing 707. In general, Mr. Nelson agreed with Mr. Kapustin's findings. Specifically, Mr. Nelson concluded that with respect to CAR 4b.381(d), the towel disposal area "appeared unsatisfactory from the fire containment standpoint," and that "it was not clear how the waste containers could possibly contain fire, as required by CAR 4b.381(d) . . . ." (Nelson deposition at 351-54 and Exhibit 26, J.A. 131-32, 146). Mr. Nelson was unable to locate any documentation or any evidence indicating that the 707 lavatory waste receptacles had been reviewed or inspected by the FAA and found to be in compliance with CAR 4b.381 (d) prior to the issuance of the Type Certificate for the Boeing 707. (Nelson deposition at 140). Following Mr. Nelson's investigation the FAA responded to the NTSB's Safety Recommendations, reporting that, with regard to the 707 waste paper containers, it had discovered "some deficiencies associated with the [fire] containment provisions" of CAR 4b.381(d). (J.A. 111).[6]

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[5] 49 U.S.C. §§ 1903, 1906.

[6] As a result of its investigation, the FAA issued two mandatory Airworthiness Directives ("ADs") requiring installation of ash trays and "No Smoking" signs in 707 lavatories and requiring compliance with Boeing Service Bulletins providing for sealing or covering the gaps and holes in the sink unit. The rationale for the ADs was that the sink unit was incapable of containing fire and that it was possible for fires originating there to "develop into uncontrollable cabin fires leading to aircraft destruction and loss of life." (Kapustin deposition, Exhibits 21.1, 21.3, J.A. 113-17).

C. Type Certification of the Boeing 707

The government's description of the FAA's type certification process raises a new argument—*never made below*— that the FAA's resources are so limited that it cannot review and inspect every component in an aircraft type design for compliance with the FARs. Brief for the United States (hereinafter "Gov't Brief"), at 7-9. Rather, says the government, the FAA must necessarily pick and choose among the component designs in deciding which to review and inspect; and it is forced to perform no more than a "spot check" for compliance with the governing regulations. The government's vision of the type certification process is based upon two FAA handbooks and on the report of a study by the National Academy of Sciences,[7] *none* of which was ever cited or relied upon in the courts below in support of the government's summary judgment motion, none of which is part of the record in the *Varig* case, and none of which was in existence at the time the FAA employees negligently reviewed and inspected the Boeing 707 for type certification purposes.[8] In addition to the procedural defects in the government's presentation, it is directly inconsistent with the FAA's Manual of Procedure for type certification[9] in existence at the time the Boeing 707 was issued

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[7] These documents are entitled National Academy of Sciences, *Improving Aircraft Safety* (1980) (hereinafter "NAS Report"); FAA, *Order 8130.2B, Airworthiness Certification of Aircraft and Related Approvals* (1982) (hereinafter "Handbook 8130.2B"); and FAA, *Order 8110.4, Type Certification* (1967) (hereinafter "Handbook 8110.4"). Handbooks 8130.2B and 8110.4 were recently lodged with the Clerk of this Court.

[8] An earlier version of Handbook 8110.4 than the one lodged with the Court by the government was marked as Exhibit 35 in the Nelson deposition. It too post-dates the type certification of the Boeing 707.

[9] *See* Civil Aeronautics Administration ("CAA"), *Manual of Procedure, Flight Operations and Airworthiness, Type Certification* (1957), produced by the government in response to VARIG's Re-

[Footnote continued on page 10]

a Type Certificate,[10] and the actual deposition testimony given by FAA witnesses in the *Varig* case.

Furthermore, the government's brief does not always discriminate carefully between Type Certificates, Airworthiness Certificates and Supplemental Type Certificates. See Gov't Brief at 7-9. The Type Certificate involves a complete design review of a proposed new aircraft type never before manufactured. The Airworthiness Certificate involves primarily a physical inspection of a completed production aircraft to ensure that it conforms to the type certificated design; it does not involve a design review as such. A Supplemental Type Certificate involves approval of what may be a relatively minor modification to an approved type design. The *Varig* case involves negligence of the FAA in the review and inspection of the type design of the Boeing 707 for purposes of the initial type certification of that aircraft. The importance of the type certification procedure is obvious since, if the FAA negligently issues a Type Certificate for a defective design, this will guarantee that *all* subsequent aircraft of that type which are produced will conform to the same defective design. Because of the importance of these matters to a proper disposition of the *Varig* case, we will outline in some detail the evidence presented below on the type certification process.

The Boeing 707 type aircraft was type certificated under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, which requires the FAA "to promote safety of flight

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[9] [Continued]

quest for Documents (3d Set) No. 62 (hereinafter "Manual of Procedure"). A copy of this Manual has been lodged with the Clerk of this Court. The CAA's regulatory authority was transferred to the FAA in 1958.

[10] The Type Certificate for the Boeing 707-100 series was first issued in 1958 (Lippis deposition at 29). VARIG's aircraft PP-VJZ was a "higher performance, long-range 300C model Boeing 707." (Ritter Affidavit ¶ 6, J.A. 153). A Type Certificate for the Model 707-300 series was issued on July 15, 1959, and for the Model 707-300C series on April 30, 1963. (J.A. 156).

of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . . ." 49 U.S.C. § 1421.[11] In order to achieve these safety goals, the Act establishes a mandatory type certification procedure. Manufacturers who wish to produce a new type of commercial aircraft must obtain from the FAA a Type Certificate for that type aircraft. 49 U.S.C. § 1423(a)(2). A Type Certificate is issued if the aircraft meets the minimum design criteria specified in the detailed safety regulations promulgated by the FAA. *See* 14 C.F.R. Parts 21 & 25.[12] The FAA's Manual of Procedure applicable to this case states: "After . . . the CAA has verified that *all* applicable airworthiness requirements are met and a statement of compliance and other information required . . . are submitted, the type certificate will be issued." Manual of Procedure at 2 (emphasis added). Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, at the time the Boeing 707 design was reviewed, testified at his deposition that the principal purpose of the entire aircraft certification process is to promote aviation safety and that "the principal beneficiaries of the certification process were the passengers and the operators of the airplanes that" the FAA certificated. (Lippis deposition at 181-82). The FAA's Director of

[11] Although PP-VJZ was one of the Model 707-300C series of aircraft, for which the Type Certificate was issued in 1963, some of the review work upon which the Type Certificate is based was performed before 1958 pursuant to the predecessor of the 1958 Federal Aviation Act, the Civil Aeronautics Act of 1938, 52 Stat. 973. For purposes of this case there is no significant difference between the policies and procedures of the 1938 Act and the 1958 Act.

[12] An Airworthiness Certificate must also be obtained for each aircraft manufactured pursuant to a Type Certificate. The Airworthiness Certificate is issued if the particular aircraft conforms to the design specified in the Type Certificate and is otherwise in condition for safe operation. 49 U.S.C. § 1423(c); 14 C.F.R. §§ 21.171-21.199.

Airworthiness, Melvin C. Beard, agreed with Mr. Lippis. (Beard deposition at 114-15).

The type certification process begins when the manufacturer submits an application for a Type Certificate. The applicant provides FAA engineers with detailed plans, data and documentation showing what it proposes to build and how it intends to demonstrate compliance with FAA regulations. (Lippis deposition at 30-31, J.A. 135). The FAA engineers then "sift through" the documentation to verify that there has been compliance with *each* applicable regulation. (Nelson deposition at 410-11, 413, J.A. 132; Lippis deposition at 39, 46, 55-56, 65, 135, J.A. 136-37, 140). While the Manual of Procedure permits the FAA engineers to check less than *all* of the data submitted by the applicant, it requires them to examine sufficient data "to ascertain that the design complies with the minimum airworthiness requirements." Manual of Procedure at 12.

After the applicant's data has been reviewed and the aircraft constructed, an FAA employee, called a "manufacturing inspector," must also inspect the aircraft in a "conformity inspection" to determine if detail design features, such as lavatory trash containers, comply with the approved design and with the applicable regulations. (Nelson deposition at 449-51, J.A. 132-34). The Manual of Procedure indicates that the manufacturing inspector's primary responsibility is to determine that the prototype aircraft conforms with drawings and specifications, and that his secondary responsibility is to cooperate with the FAA engineers "in the approval of certain design aspects which can best be evaluated by physical examination." *Id.* at 11-1. With regard to determining conformity, the Manual of Procedure states that "[r]egardless of the manufacturer's experience, it is the FAA inspector's responsibility to assure that a complete conformity inspection has been performed by the manufacturer and that the results of this inspection are properly recorded and reported." *Id.* at 11-2.

Contrary to the government's assertion, the FAA engineers and inspectors performing the type certification design reviews and inspections may not disregard *any* regulations, nor do they have authority to conclude that compliance with a particular regulation is unnecessary. Their function is simply to compare the design with the regulations and to determine whether the design meets the minimum regulatory requirements. If it does not, the FAA inspectors have *no* discretion to accept the design notwithstanding the deficiency. Rather, the Type Certificate *must* be withheld until the manufacturer submits a design modification or other means of correcting the deficiency.

The role of FAA engineers in the type certification process was discussed at length in the depositions of FAA employees Richard Nelson and Rocco Lippis. For example, Mr. Nelson confirmed that CAR 4b.381(d) is clear and that an aircraft *cannot* be type certificated if it does not comply with that regulation. Mr. Nelson testified:

> Q. [By counsel for VARIG] And to the extent that those trash containers would not contain fire as a result of those holes, they would not be in compliance with 4b.381(d)?
>
> . . . .
>
> A. THE WITNESS [Mr. Nelson]: I don't know that I understand the question that well, but *the container either does or doesn't contain the fire. There is no in between.*
>
> Q. And if it doesn't contain fire, then it doesn't comply with 4b.381(d) in your view?
>
> A. Yes . . . .
>
> . . . .
>
> Q. But to be type certificated, the lavatories on an aircraft *must* comply with that regulation?
>
> A. *Yes.*

(Nelson deposition at 149-50, J.A. 130-31, emphasis added). Mr. Nelson expanded on his description of the certification process later in the deposition:

Q. For the initial certification of a new aircraft, would there be a compliance item for *every regulation that applies to that aircraft*?

. . . .

THE WITNESS: *Yes.* That is the recommended way to type certificate airplanes, is to have a compliance checklist. *There should be an item for each particular rule.*

Q. Assuming certification of an aircraft now, I take it that a new aircraft design could not be type certificated absent a finding by the FAA of compliance of the lavatories on that aircraft with FAR 25.853(d) [successor to CAR 4b.381(d)]?

A. There is a requirement for the waste containers in the rule that would have to be complied with.

Q. Would that be an item in that certification process?

A. Yes. I retract. They may have an item just covering all of .853. But it could be that they would itemize it.

Q. When you say all of .853, that would include the flammability requirements as well?

A. Yes. That could vary by regions how they handle this.

Q. *But what would not vary is at some point someone would have to review data to show compliance with that regulation both as to the flammability and the containment aspects*?

A. *Yes.*

. . . .

Q. . . . I take it that was true also during the 707 process, that *someone at the FAA would have had to review data from Boeing showing compliance with the predecessor 4b.381(d).*

A. *Yes,* there should have been someone reviewing this.

> Q. I take it that that review would have to be made for each separate type certificate issued for the various models of Boeing aircraft.
>
> A. The airplane must be in compliance with the rules, yes, so, for each certificate.

(Nelson deposition at 427-30, emphasis added).

Similarly, Mr. Lippis testified that the regulations are "mandatory on . . . the certificating engineer" and "must be complied with." (Lippis deposition at 132-33). The FAA engineers are charged with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81, J.A. 139-40). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*). In certain circumstances, the design review may be performed initially by a Designated Engineering Representative ("DER"), who is an employee of the manufacturer acting as an agent of the FAA. (Nelson deposition at 438-39). But the ultimate responsibility still rests with the FAA engineers to ensure that the aircraft design meets every applicable regulation.

As the government candidly admits, the evidence in the *Varig* case is to the effect that neither the FAA nor anyone else *ever* inspected or reviewed the design of the 707 lavatory trash container to verify compliance with CAR 4b.381(d). Gov't Brief at 37. As part of his post-accident investigation, Richard Nelson searched the FAA's records in an attempt to find evidence that the waste container had been inspected for compliance with CAR 4b.381(d). He was unable to find any such evidence. (Nelson deposition at 139-42, J.A. 129-30). During discovery in the district court, the government was likewise unable to produce *any* evidence that the 707 lavatory

waste container was ever actually inspected or reviewed, despite repeated requests for such evidence by VARIG.

VARIG sought from the United States the identity of the person or persons who reviewed and/or inspected the 707 lavatory waste containers. The United States provided names of several people who "might" have been involved in the inspection. VARIG took the depositions of FAA employees Jack Bulmer, Rocco Lippis and Harold Tanke; but none of the witnesses had reviewed or inspected the trash container, and none could provide any evidence that someone else had performed the review or inspection. VARIG also made repeated requests to the United States for any documents showing that the 707 waste containers had been inspected. The only evidence produced by the government was two documents. One was a letter from former FAA employee W. A. Klikoff to Boeing stating that "final approval of the various interior arrangements [on the 707 model] will be dependent upon our inspection of the completed airplane." [13] The other document was entitled "Check List Interior Arrangement" and was to be filled out by an FAA employee, now deceased, W. B. Spelman. (J.A. 154-55). One of the items listed was "CAR 4b.381(d) CHECK FOR: Fire resistant, covered waste containers." *Id.* The check list was never filled out by Mr. Spelman; and there is no documentary evidence or testimony that he, or anyone else, actually checked, reviewed or inspected the lavatory trash containers in any way prior to type certification of the 707. (Curtiss deposition at 156, J.A. 142). Mr. Nelson testified in his deposition that compliance check lists are normally used by the FAA during the type certification process and that they are maintained in the files after the Type Certificate is issued. (Nelson deposition at 395, 398).

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[13] See Letter from W. A. Klikoff to B. L. Carter dated March 5, 1958, Excerpt of Record in the court of appeals, at 239.

D. Disposition in the Courts Below

VARIG commenced this action in the district court to recover for the total destruction of its 707 jet aircraft. VARIG's complaint stated a claim against the government under California's Good Samaritan doctrine. VARIG alleged that the government had undertaken to inspect and issue Type Certificates for commercial aircraft; that VARIG relied upon the undertaking; that the government had negligently performed its undertaking with respect to the Boeing 707; that the FAA had negligently failed to require Boeing to comply with the applicable FARs; that the FAA had negligently issued a Type Certificate for the Boeing 707 when it knew or should have known that its design did not comply with the applicable FARs; that this negligence increased the risk of harm to users and operators of 707s; and that the government's negligence proximately caused the destruction of VARIG's aircraft.[14]

On October 31, 1980, the government moved for summary judgment, arguing that VARIG's First Amended Complaint should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a), 2680(h). In opposition to the motion, VARIG submitted, among other things, the affidavit of its Manager of Engineering and Maintenance Base, Frederico J. Ritter. With regard to VARIG's allegations of reliance, Mr. Ritter stated:

> When a manufacturer like BOEING has a 'type certificate' for an aircraft model, such as the BOEING 707, VARIG relies upon the fact that BOEING has completed all of the tests and other requirements laid down by the U.S. FAA, in obtain-

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[14] First Amended Complaint ¶¶ 11-15 (J.A. 19-21). All parties agree that California law governs this action.

> ing that type certificate. VARIG neither seeks nor reviews the mass of detailed design drawings, data, tests and other documentation submitted by BOEING to the FAA when applying for such a type certificate. Such a review is completely beyond the scope and purpose of VARIG's engineering department. Similarly, when a manufacturer like BOEING has completed an aircraft which has been built pursuant to a type certificate, such as PP-VJZ, the U.S. FAA physically inspects that aircraft to see that it complies with the U.S. FAA's Federal Air Regulations ('FAR's') before issuing the individual aircraft an 'airworthiness certificate.' . . . The airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with the regulations. Neither does the Brasilian Government when the aircraft is registered in Brasil. . . . In summary, the airline purchases an aircraft which it assumes was certificated to a certain level of airworthiness. Thereafter, the job of the airline's engineering and maintenance department is to *maintain* that level of airworthiness and not allow it to degrade.

(Ritter Affidavit ¶ 3, J.A. 150-51). The Ritter Affidavit remains completely uncontradicted in this case.

The district court granted the motion for summary judgment, essentially agreeing with all of the government's arguments. Appendix to Petition for Certiorari ("Pet. App.") at 8a-13a. However, the district court rejected proposed findings of fact submitted by the government to the effect that there was no negligence by the FAA, no reliance by VARIG, and no increase in the risk of harm to VARIG.[15]

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[15] The district court struck out the following proposed findings of fact submitted by the government:

> 13. The United States of America's inspection and certification of the Boeing 707 aircraft did not increase the risk of harm to Plaintiffs.

[Footnote continued on page 19]

On appeal, the Ninth Circuit reversed. 692 F.2d 1205 (9th Cir. 1982) (Pet. App. 1a-7a). The court of appeals held that the government could be held liable for negligent inspection and type certification of commercial transport category aircraft under California's Good Samaritan doctrine, and that neither the discretionary function exception nor the misrepresentation exception of the Tort Claims Act barred the action. At the same time, the court of appeals also handed down its decision reaching the same result in the *United Scottish* case. 692 F.2d 1209 (9th Cir. 1982) (*United Scottish* Pet. App. 1a-6a).

SUMMARY OF ARGUMENT

1. For the last 30 years the government has been arguing that it should not have any liability under the Federal Tort Claims Act in connection with "uniquely governmental functions." The argument finds no textual support in the Act itself and has been thoroughly repudiated by a consistent line of decisions in this Court. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). The government makes the same argument again here, although it offers no compelling reasons why the earlier decisions should now be overruled. The government appears to be primarily concerned with the liability it may incur as a result of negligent FAA review and inspection in connection with commercial aircraft type certification activities. If so, the proper remedy is a request to Con-

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[15] [Continued]

14. The United States of America's inspection and certification of the Boeing 707 aircraft did not induce reliance by the Plaintiffs.

17. There was no negligence on the part of the United States of America or any of its employees that was a proximate cause of this accident.

Excerpt of Record in the court of appeals, at 18. Appendix B to the government's petition in this case correctly omits findings of fact Nos. 13 and 14, above, but erroneously includes finding No. 17, above. Pet. App. 10a. The error is corrected at J.A. (I) n.*.

gress for an amendment to the Tort Claims Act, not a request that this Court create an exception to the Act where none now exists.

In accordance with *Indian Towing*, the United States can be held liable under the Good Samaritan doctrine of the applicable state law. All parties agree that this case is governed by California law and that California has adopted the Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. The government raises some rather fine points about the application of the *Restatement* to the facts of this case. Yet the pertinent law, including particularly the *Restatement* Illustrations, clearly supports the lower court's determination that the FAA's review and inspection in connection with aircraft type certification activities fall within California's Good Samaritan doctrine. The government also questions whether VARIG reasonably relied upon the FAA's undertaking to inspect and certificate commercial aircraft. The affidavit of Frederico J. Ritter, Manager of VARIG's Engineering and Maintenance Base, establishes the requisite reliance beyond any doubt. Ritter's affidavit remains completely uncontradicted in the record, and it clearly refutes the government's reliance argument.

2. When a federal employee's activities are directed and constrained by specific, mandatory agency safety regulations pertaining to fire protection in aircraft, he is stripped of all policy-making discretion; and the discretionary function exception, 28 U.S.C. § 2680(a), does not apply. The government agrees with this basic principle; indeed it could hardly disagree in the light of the case law and the structure and wording of section 2680(a). In the present case, CAR 4b.381(d) deprives the FAA engineers and inspectors of all discretion. They are bound to apply and enforce the regulation as it is written; no room is left for any policy judgments or public interest determinations. They especially have no discretion to ignore, disregard or overlook the requirements of a fire protection

safety regulation, as the evidence shows they did here with respect to the Boeing 707. Thus the court of appeals properly rejected the government's discretionary function defense in this case.

The government nevertheless contends that the exception should apply here because the FAA engineers and inspectors do not check for compliance with every regulation but rather perform a "spot check" of the aircraft design submitted for type certification. As a result, the argument goes, FAA engineers and inspectors must exercise discretion in deciding which design features should be reviewed and which regulations should be enforced before the issuance of a Type Certificate. This is an entirely new argument that was never made in the courts below; it cannot properly be raised here for the first time. Beyond that, the argument is wrong as a matter of fact. The record evidence in this case, including extensive testimony by FAA employees, shows that there is no "spot check" procedure for type certification of commercial aircraft. The FAA engineers and inspectors are required to ensure that *every* design feature of the aircraft is checked for compliance with *every* applicable regulation. They have no discretion to disregard *any* of the safety regulations. The "spot check" defense cannot be sustained on the facts in this record.

3. The government's position on the misrepresentation exception, 28 U.S.C. § 2680(h), is foreclosed by this Court's recent decision in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). Like the plaintiff in *Block*, VARIG has asserted a property damage claim that does not depend upon misstatements contained in any report, certificate or other document issued by the government. Rather, the gravamen of VARIG's claim is that the FAA engineers and inspectors negligently reviewed and inspected the design drawings, data, prototypes and other matter submitted by Boeing with its application for a Type Certificate for the 707, and negligently failed to require Boeing to comply with the applicable safety regu-

lations, including CAR 4b.381(d), prior to the issuance of a Type Certificate for the 707. This case is on all fours with *Block v. Neal*, and the misrepresentation exception is inapplicable here, just as it was in *Block*.

ARGUMENT

I. THE GOVERNMENT CAN BE HELD LIABLE FOR THE NEGLIGENCE OF FAA EMPLOYEES IN REVIEWING AND INSPECTING, FOR TYPE CERTIFICATION PURPOSES, THE DESIGN OF COMMERCIAL AIRCRAFT

The government's opening argument is that it cannot be held liable under the Tort Claims Act for the FAA's negligence in the review and inspection, for type certification purposes, of the design of commercial aircraft because these are "core governmental activities." In the alternative, the government insists it cannot be held liable because the California Good Samaritan doctrine is inapplicable to the facts of this case. Gov't Brief at 21-38. Neither argument is at all persuasive.

A. There Is No Exception In The Tort Claims Act for "Core Governmental Activities"

The government begins by arguing that it can have no liability here because the FAA's inspection and certification of aircraft is a "quintessentially sovereign function" falling within "a core of governmental activities that are never engaged in by private citizens." Gov't Brief at 23-24 & n.21.[16] These activities, the government urges, must

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[16] The government is simply wrong in asserting that this supposedly "governmental" function is "never engaged in by private citizens." The district court in *United Scottish* found as a fact that private persons inspected commercial aircraft for airworthiness before 1926, when the federal government preempted the field. *United Scottish*, Pet. App. 18a, 24a. In affirming, the court of appeals left that finding untouched; and the government has made no direct attempt to rebut it here. In this respect, inspection of aircraft is similar to air traffic control services, which were provided by the private sector until the government took over that function.

[Footnote continued on page 23]

be preserved "inviolate from tort suits." *Id.* at 23. To accept the government's argument would require the Court to overrule a line of decisions stretching back almost 30 years. The seminal case is *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), in which the government insisted that it could not be liable because operation of a lighthouse is a "uniquely governmental function" that private persons do not perform. 350 U.S. at 64. The Court rejected this argument, noting that it would "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. As the Court recognized, *all* governmental activity "is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* Thus, to distinguish between "governmental" and "non-governmental" activities would be "to draw distinctions so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.* at 68. The Court also pointed out that to accept the government's argument would be to make liability turn on "a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 67. The Court was unwilling to attribute any such "bizarre motives" to Congress, noting that "[t]he broad and just purpose which the statute was designed to effect was to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. . . ." *Id.* at 68.

The "governmental function" defense was also urged in an early air traffic controller case entitled *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.

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[16] [Continued]

See Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62, 74 (D.C. Cir.), *aff'd mem. sub nom., United States v. Union Trust Co.*, 350 U.S. 907 (1955). As in the present case, the "governmental function" defense was rejected in *Union Trust*. In any event, the Court has made it clear that Tort Claims Act liability does not turn on "the presence of identical private activity." *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955).

1955). The court of appeals rejected the government's claim that it could not be held liable because its controllers "perform governmental functions of a regulatory nature that are not performed by individuals." 221 F.2d at 73. The government raised the issue again in its petition for certiorari,[17] and this Court summarily affirmed on the authority of the *Indian Towing* decision. *United States v. Union Trust Co.*, 350 U.S. 907 (1955). For purposes of this case, there is no conceivable distinction between the FAA's air traffic controllers and its type certification engineers and inspectors. They both perform functions that are "governmental" to the same degree, and they both are charged with the duty of promoting safety in air transportation. If, as this Court held, there is no "governmental function" defense for air traffic control activities, there logically can be none for FAA review and inspection activities connected with the type certification process for commercial aircraft.

As the government concedes, the Court similarly rejected the "governmental function" defense in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), involving Forest Service fire-fighting activities, and in *United States v. Muniz*, 374 U.S. 150 (1963), involving supervision and care of inmates in a federal prison. See Gov't Brief at 24. If fighting fires and running prisons are not "core governmental activities," then nothing is. If the government can be held liable for negligence in performing those kinds of activities, it surely can be held liable for the FAA's negligent review and inspection in connection with the type certification of commercial aircraft. As this Court said in *Rayonier*: "It may be that it is 'novel and unprecedented' to hold the United States ac-

[17] The government's argument concerning control towers, made to this Court in its petition for certiorari in the *Union Trust* case almost thirty years ago, is nearly identical to the argument made in its brief in this case concerning FAA type certification activities. See Petition for a Writ of Certiorari at 25, *United States v. Union Trust Co.*, 350 U.S. 907 (1955).

countable for the negligence of its fire-fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented liability." 352 U.S. at 319.

The government attempts to distinguish these cases on the ground that it was "critical" to each case that the government agency involved "had assumed direct, operational responsibility for the activity that caused the injury." Gov't Brief at 24. Yet nothing in the Court's opinions in these cases suggests that the factor identified by the government was in any way critical—or even material—to the result reached. Furthermore, it is difficult to see how the distinction drawn by the government separates this case from the others that have gone before. For example, the regulation and control of air traffic hardly seems more "direct" or "operational" than the regulation and control of aircraft design and construction. The same can be said of the supervision of federal prisoners. The government is no more the direct and operational cause of an injury inflicted by one inmate on another than it is the direct and operational cause of an airplane crash resulting from an unsafe component that should have been detected by the FAA. In short, the distinction urged by the government simply will not withstand scrutiny.

The government points to nothing in the text of the Act itself that would justify reversing 30 years of jurisprudence and adopting a new immunity for "core governmental activities." We are referred only to the provision in 28 U.S.C. § 2674 that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." Gov't Brief at 21. Yet the government cited the *exact* same statutory provision in support of *exactly* the same argument in *Indian Towing*. 350 U.S. at 64-65. The Court rejected the argument in that case, and there is no reason to accept it here.

Moreover, the government provides no sound policy reasons for creating a new "governmental function" de-

fense. The government never explains why it should be free from liability for negligent review and inspection of aircraft designs in connection with the type certification of commercial aircraft. All we can extract from the government's brief is a generalized concern that tort suits should not be permitted to disrupt and interfere with the important regulatory functions of the federal government. Yet this concern is addressed by the discretionary function exception, 28 U.S.C. § 2680(a), which is admittedly "comparable" to the new exception that the Court is asked to create here. See Gov't Brief at 23 n.21. It would be wholly inappropriate to read a broad new exception into the Tort Claims Act when the general area of concern is already addressed by one of the thirteen specific exceptions that Congress listed in section 2680.[18] As the Court has held: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957).[19]

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[18] As will appear in the next section of this brief, the discretionary function exception does not bar VARIG's claims in this case.

[19] In addition to its attempt to distinguish the Court's decisions rejecting a "governmental function" defense, the government argues that the legislative history of the Tort Claims Act supports its argument. Gov't Brief at 22. A full reading of the remarks of Rep. Gwynne, portions of which are cited in the government's brief, shows that he was referring to the discretionary function exception to the Act, and not to a "governmental function" defense. *See* 86 Cong. Rec. 12,021 (1940). Furthermore, there are numerous references in the legislative history to the fact that the Act was intended to include "the broad field of common law torts," and to the widening scope of the activities of the federal government and its increasing intrusiveness into private business and daily life. *See Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 37 (1942); 86 Cong. Rec. 12,018 (1940) (remarks of Rep. Celler); 69 Cong. Rec. 2186, 2187, 3118, 3123 (1928) (remarks of Reps. Underhill, Box); 67 Cong. Rec. 7526, 7529, 11,092 (1926) (remarks of Reps. Underhill, Celler); H.R. Rep. No. 206, 69th Cong., 1st Sess. 10 (1926).

The government also attempts to support its position by citing a long list of statutes under which various federal agencies perform inspection and/or certification activities. Gov't Brief at 26-27 & nn.25-29. From this, the government argues that its potential liability will be "staggering" unless the present case is reversed. Gov't Brief at 28. This, of course, is the same argument that the government advanced unsuccessfully in *Rayonier*, *supra*. In that case the Court said:

> The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. . . . But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grieviously harmed.

352 U.S. at 319, 320. *Indian Towing* also makes it clear that the Court should not attempt to act as "a self-constituted guardian of the Treasury" and "import immunity back into a statute designed to limit it." 350 U.S. at 69. If the Tort Claims Act is to be altered because of the "heavy burden" it may impose on "the public treasury," then "that is a function for the same body that adopted it." *Rayonier*, *supra*, 352 U.S. at 319, 320.

Moreover, the potential liability for acts of other agencies under other statutes is not before the Court now. *This* case involves only the government's liability for the negligence of FAA engineers and inspectors under the particular facts and circumstances presented by the record here. The other agencies listed by the government may or may not give rise to liability under their statutes

and regulations and the applicable state law. The issue will have to be resolved in other cases that properly raise the question.[20]

Finally, it is not at all clear that an affirmance here will lead to unduly burdensome liability even with respect to the FAA's activities. The government will not be held liable as an insurer or on any theory of liability without fault. See Gov't Brief at 28-29. The plaintiff can only prevail by presenting sufficient evidence to persuade a district judge, sitting without a jury, that the government was negligent under the applicable state law. In the *Varig* case, the evidence shows that the FAA was required to review and inspect the Boeing 707 lavatory waste container design to ascertain that it complied with a mandatory FAA fire protection safety regulation before issuing a Type Certificate for the Boeing 707; that the FAA failed to do so; and that the design did not, "by any stretch of the imagination," comply with the FAA's own safety regulations. The evidence in the *Varig* case is more than sufficient to make out a case of negligence under California law. In no sense is the government an insurer here; it will simply be held responsible for the consequences of its negligence, as Congress intended when it passed the Tort Claims Act.

Even if the government is found liable, it will often be able to obtain contribution or indemnity from other parties. When the FAA is negligent in failing to discover a defective aircraft design, the aircraft manufacturer is usually negligent as well for having conceived the faulty design and tendered it to the FAA for type certification. There may also have been negligence on the part of a component supplier. The government can—and doubtless will—seek comparative equitable contribution or indemnity from such parties under the applicable state law by

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[20] For instance, in all but one of the cases cited by the government in nn. 25 through 29 of its brief, the *government* prevailed. The other case is presently before the Third Circuit on appeal. See Gov't Brief at n. 25.

impleader or by a separate action.[21] *See United States v. Yellow Cab Co.*, 340 U.S. 543, 551-52 (1951); *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441 (1978); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

Furthermore, where the passengers or their beneficiaries sue multiple defendants in litigation arising out of air crash disasters, the government can cross-claim against the operator, the manufacturer and/or any other defendants for contribution or indemnity; or it may obtain the benefit of any settlements entered into between the plaintiffs and any of the other defendants. *See, e.g.*, Section 877, California Code of Civil Procedure.[22] In the litigation arising from the VARIG crash, for example, the government notes that the *Mascher* plaintiffs have settled their suits against Boeing, Seaboard World Airlines and five component manufacturers. Gov't Brief at 15 n.16. Should the sum of those settlements exceed what the district court determines to be the plaintiffs' damage here, the government will not be liable to them for any amount. Thus, the government's ultimate liability in these cases is not likely to be "staggering" at all.

B. The Government Is Liable Under The Good Samaritan Doctrine

The government contends, in the alternative, that even if its "core governmental activity" defense is rejected, there still can be no liability because the California Good Samaritan doctrine is inapplicable under the particular

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[21] In an article which the government cites in its brief for other purposes (see Gov't Brief at 41, 44) the authors, who are FAA lawyers, acknowledge that the government will generally seek indemnity in aircraft certification cases. *See* Harrison & Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 44-45 (1978).

[22] Section 877, California Code of Civil Procedure, provides that when a plaintiff settles with one tortfeasor, his claim against the remaining tortfeasors is reduced by the amount of the settlement.

facts and circumstances of this case. Gov't Brief at 29-38. The Good Samaritan doctrine is inapplicable here, in the government's view, for two basic reasons: (1) The FAA performed no direct, necessary service for VARIG; and (2) VARIG did not rely upon the FAA's undertaking to inspect and certificate aircraft. Neither argument can be sustained.[23]

The government concedes that this case is controlled by the California Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. Gov't Brief at 29-30. *See Coffee v. McDonnell Douglas Corp.*, 8 Cal. 3d 551, 105 Cal. Rptr. 358, 503 P.2d 1366 (1972). Indeed, it could hardly do otherwise in the face of this Court's clear language in *Indian Towing, supra*. In that case the Court said: "[I]t is hornbook tort law that one who undertakes to warn the public of dangers and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." 350 U.S. at 64.[24] The government argues, however, that California law would permit no recovery because the FAA performed no services "directly" to VARIG, but rather to the "public as a whole," and because the injury suffered by VARIG is "so far removed" from the FAA's negligence. Gov't Brief at 30-32. In support of its conten-

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[23] Since the Good Samaritan issues are a matter of local state law, it would be appropriate to defer to the court of appeals' interpretation and application of the law on these issues. *See Runyon v. McCrary*, 427 U.S. 160, 181-82 (1976); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949).

[24] Since *Indian Towing* the lower courts have uniformly held that "when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently." *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 236 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). In *Ingham*, an air traffic control case, the Second Circuit said: "[W]e can give little weight to the government's claim that since its initial decision to provide weather information was a gratuitous one, it could proceed with impunity to violate its own regulations and act in a negligent manner." 373 F.2d at 236.

tion, the government quotes the Ninth Circuit's holding in *Roberson v. United States*, 382 F.2d 714, 720 (9th Cir. 1967), that Good Samaritan liability attaches when "the purpose of the action was to render a direct service to the person who was injured, *or to persons of that class*" (emphasis added).[25] Gov't Brief at 30. The *Roberson* court did *not* hold that the service had to be undertaken specifically for the benefit of the particular person who was injured. Instead, the plaintiff need only be one of the class of persons for whose benefit the services were performed. In the present case, Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, testified at his deposition that the "principal beneficiaries" of the FAA certification process are "the passengers and the operators of the airplanes" that the FAA inspects and certificates. (Lippis deposition at 181-82). Similarly, the FAA's Melvin Beard testified at his deposition that the "intended beneficiaries" of the certification process are "the passengers and the operators of the airplane." (Beard deposition at 114-15). VARIG is clearly a member of that class of beneficiaries.

Furthermore, the proposition urged by the government finds no support in the *Restatement* itself. Neither section 323 nor section 324A provides that the services must be undertaken for the specific benefit of a particular person, and the Illustrations accompanying these sections are wholly to the contrary. For example, Illustrations 2, 3 and 4 to section 324A all establish liability for inspection activities undertaken for the benefit of the general public or a large class of persons. The services were not performed for the particular benefit of a specific person. The present case is analogous to the *Restatement* Illustrations. VARIG is plainly a member of the class benefitted by the FAA's inspection and certification activities,

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[25] The *Roberson* case applied Arizona law, not California law. However, the Ninth Circuit concluded that Arizona would follow the *Restatement* formulation of the Good Samaritan doctrine. *See* 382 F.2d at 718.

and it is entitled to recover under the Good Samaritan doctrine when it suffers injury as a result of FAA negligence.

There is likewise no basis for the government's claim that VARIG cannot recover because it is too "remote" and too far "removed" from the FAA's negligence. Gov't Brief at 32-33. Certainly it is no defense that the crash of PP-VJZ did not occur until several years after the FAA's negligence. That is often true in tort cases, but it does not exonerate the defendant from liability. Indeed, the government cites no authority whatsoever for its novel theory that the passage of time alone bars recovery; and the law of California is to the contrary.[26] The interval between the FAA's negligence and VARIG's injury is simply irrelevant for purposes of this case. Similarly, it is no defense that VARIG was "remote" in the sense that it had no direct interface with the FAA and the certification process for the Boeing 707. The same was true of the injured parties in the *Restatement* Illustrations mentioned above, yet the remoteness was no bar to recovery. Here again, the government is unable to cite any case holding that there must be direct dealings between the Good Samaritan and the injured party.[27]

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[26] Under California law, a negligence cause of action accrues when the injury occurs. *Oakes v. McCarthy Co.*, 267 Cal. App. 2d 231, 73 Cal. Rptr. 127, 141 (1968). VARIG's cause of action accrued on July 11, 1973, when PP-VJZ crashed. VARIG commenced this action within the limitations period specified by the Tort Claims Act. 28 U.S.C. § 2401(b).

[27] The government's "remoteness" argument in this case is ironic in view of the following statement made by a former administrator of the FAA to a "Blue Ribbon Panel on Aircraft Certification":

> American aircraft and components are not important just to America, as the export figures I mentioned a moment ago clearly reflect. In 1978, the number of turbine-engine aircraft used worldwide in commercial service was slightly over 7,500. *Over 68% of these aircraft were built by American manufacturers.*

[Footnote continued on page 33]

The government also attempts to escape liability on the theory that the FAA's inspection and certification activities were not "necessary" to protect VARIG or anyone else because manufacturers and operators of aircraft have the primary responsibility for aviation safety. Gov't Brief at 33. This argument makes no sense. Obviously Congress would not have enacted the Civil Aeronautics Act of 1938, 52 Stat. 973, and then the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, if it thought the legislation was unnecessary. Congress would not have directed the FAA "to promote safety of flight of civil aircraft," 49 U.S.C. § 1421, unless it found a need for such administrative action.[28] Congress also directed the FAA to issue aircraft Type Certificates only upon a finding that the design complies with the agency's mandatory safety regulations. 49 U.S.C. § 1423(a)(2). Congress clearly thought this certification process necessary to promote public safety, and the government should not be heard now to argue that it was an "unnecessary service."[29]

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[27] [Continued]

> It is readily apparent that there exists throughout the world a healthy respect for U.S. aviation products. That respect is well founded. Our international posture in aviation has been aided in great measure by the safety of the aircraft we produce, guided by stringent safety standards which are held in high esteem by the world's aviation authorities.

The Honorable Langhorne Bond, Administrator of the Federal Aviation Administration, *Statement before the Blue Ribbon Panel on Aircraft Certification* (January 21, 1980) (emphasis added).

[28] As the report of a special House subcommittee reviewing FAA performance stated: "Unlike some other agencies of the Government, whose responsibilities center on economic regulation, the responsibilities of the FAA directly involve human life and safety." Special Subcomm. on Investigation of House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess., *Air Safety: Selected Review of FAA Performance* 1 (Subcomm. Print 1975) (hereinafter cited as "Selected Review").

[29] The government also makes the remarkable suggestion that the FAA was intended only to "encourage" private parties to comply

[Footnote continued on page 34]

In addition, the FAA is not relieved of its Good Samaritan duties simply because aircraft manufacturers and operators also have safety responsibilities. Once again, the *Restatement* Illustrations completely undercut the government's position. For example, Illustration No. 2 accompanying section 324A states:

> 2. The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

Obviously the Telephone Company in this illustration would be primarily responsible for the safety of the poles it erects along a public highway. Nevertheless, the inspector is liable to members of the public who are injured as a result of his negligence in inspecting the poles. The same is true here. The government is not relieved of liability merely because Boeing also has a responsibility to design safe aircraft.[30]

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[29] [Continued]

"voluntarily" with the FARs. Gov't Brief at 31. This is a clear misreading of the governing statute. It is unlawful to operate an aircraft without a current Airworthiness Certificate in effect. 49 U.S.C. § 1430(a)(1). An Airworthiness Certificate may be issued only if the aircraft conforms to the Type Certificate. 49 U.S.C. § 1423(c). A Type Certificate may be issued only if the aircraft design meets all applicable FARs. 49 U.S.C. § 1423(a)(2). Thus compliance with the FARs is in no sense "voluntary."

[30] A House committee report on the FAA's type certification process disagreed with the government's view that the ultimate responsibility for air safety lies with the airline industry. It said: "Despite its overall excellent safety record, the industry should not be left to regulate itself. . . . [*T*]*he FAA remains the sole guardian of public safety.*" House Comm. on Government Operations, *A Thorough Critique of Certification of Transport Category Aircraft by the Federal Aviation Administration*, H.R. Rep. No. 924, 96th Cong., 2d Sess. 10 (1980) (emphasis added) (hereinafter cited as "Critique").

The government's final attack on the Good Samaritan doctrine focuses on the element of reliance. Gov't Brief at 34-37.[31] The argument, essentially factual in nature, is that VARIG did not reasonably rely upon the FAA's undertaking to inspect and certificate aircraft. Yet the government completely ignores the lengthy affidavit of Frederico J. Ritter, VARIG's Manager of Engineering and Maintenance Base, which is quoted *supra*, p. 17-18. That affidavit remains *completely uncontradicted* in the record, and it shows conclusively that VARIG relied upon the FAA's inspections of commercial aircraft.[32]

The government argues that VARIG should not have relied upon the FAA because the aircraft type certification process is nothing more than a "spot check" inspection that does not purport to ensure compliance with all applicable safety regulations. Gov't Brief at 37. This "spot check" defense is an entirely new argument that was *never* made below and cannot properly be raised here

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[31] The plaintiff can recover under the *Restatement* if the defendant's negligence increases the risk of harm *or* if the plaintiff relies upon the defendant's undertaking. The government dismisses the first alternative as "plainly inapplicable." Gov't Brief at 34. The government glosses over this point far too quickly. The risk of harm was increased here in that, if the FAA had required Boeing to comply with CAR 4b.381(d), VARIG would not have been unwittingly operating a dangerously defective aircraft. As noted, the district court specifically rejected a proposed finding of fact to the effect that there was no increase in the risk of harm. *See supra* n. 15. This would clearly be a contested issue of fact which could not be decided on a motion for summary judgment. In any event, the evidence of reliance is so strong that we need not dwell on this point.

[32] Throughout its brief, the government attempts to recharacterize VARIG's reliance as reliance upon the FAA's Type and Airworthiness Certificates. See, e.g., Gov't Brief at 36. The Ritter affidavit makes clear, however, that VARIG actually relied upon the FAA's review and inspection of Boeing's design drawings, data, tests and prototypes, and upon the fact that Boeing was required to meet all of the FAA's requirements. The physical pieces of paper embodying the Type and Airworthiness Certificates are at most incidental to VARIG's reliance.

for the first time. *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137, 1143 n.7 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Moreover, the government's argument is unsupported by affidavits or any other evidence inserted in the record and presented to the district court in support of the government's motion for summary judgment. To the contrary, the government's position is *directly* contradicted by the evidence that is in the record. The deposition testimony of the present and former FAA employees all shows that the type certification process is not a spot-check inspection. See *supra*, p. 13-15. Rather, compliance with *all* FARs is mandatory; and the FAA engineers must verify compliance with all FARs before the aircraft can be type certificated. The pertinent FAA testimony is discussed more fully in the next section of this brief in connection with the discretionary function exception. Suffice it to say here that the government's spot-check defense is completely inconsistent with the facts presented to the courts below. In any event, the reasonableness of VARIG's reliance is surely a contested issue of fact that could not properly be decided against VARIG in the context of a summary judgment motion.

Finally, the government doubts VARIG's reliance because VARIG is a Brazilian airline but did not request an Export Certificate of Airworthiness from the FAA for PP-VJZ. Gov't Brief at 36 n.35.[33] Again, the govern-

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[33] There is an undercurrent throughout the government's brief suggesting that it is somehow wrong for Brazilian citizens to seek recovery under the Tort Claims Act. See, e.g., Gov't Brief at 7, 14-15, 17, 28, 34-36. There is nothing in the Act precluding recovery by foreign citizens; the government does not contend otherwise. Indeed, an earlier version of the Act excluded "claims of aliens arising in foreign countries." *See Tort Claims Against the United States: Hearings on S. 2690 Before the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 39 (1940). The reference to aliens was deleted from the Act as passed, and the exclusion was broadened to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The district court here determined in a separate ruling that VARIG's claims did not arise in a foreign country, and the government chose not to contest that ruling on appeal.

ment's argument is not supported by the record. The FAA's Melvin Beard testified that an Export Certificate is "not required" and that "many products are exported abroad without us having issued an export certificate of airworthiness." (Beard deposition at 141). In addition, the Ritter affidavit demonstrates that VARIG does not rely particularly upon pieces of paper such as Type and Export Certificates. Rather, it relies upon the type design review and inspection process that the FAA undertakes before allowing any commercial aircraft to be produced and sold in the United States. Here, VARIG knew that the Boeing 707 had been through this type review and inspection process; and no certificate was necessary to engender VARIG's reliance.[34] The Export Certificate issue is clearly a red herring.

II. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT BAR VARIG'S CLAIMS

A good starting point for analysis of the discretionary function exception, 28 U.S.C. § 2680(a), is provided by the government's oral argument before this Court in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). During that argument, counsel for the government described the discretionary function exception as follows:

> If there were a regulation in this case that said that the government must discover every defect and must make every defect corrected . . . then it would seem to me we would be hard pressed to argue that that is a discretionary decision, *because the regulation will have essentially taken away all our discretion.* But if the regulation *merely suggests* that we should have inspections . . . then it would seem clearly to be within the discretionary function exception.

Transcript of Proceedings before the Supreme Court (Jan. 19, 1983), at 13-14, *Block v. Neal*, 103 S.Ct. 1089 (March 7, 1983) (emphasis added).

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[34] Indeed, VARIG purchased PP-VJZ from Seaboard World Airways, and Seaboard could not have operated the aircraft if it had not been through the FAA's type certification process. 49 U.S.C. §§ 1423, 1430(a)(1).

As the government admits, when a mandatory agency regulation constrains and directs the activities of federal employees, their discretion has been eliminated; and they cannot fairly be said to be performing a discretionary function. In this respect, government counsel was simply echoing a long line of cases holding that the negligent implementation of regulations is not protected by the discretionary function exception. *See, e.g., Hylin v. United States*, No. 81-2931 (7th Cir. Aug. 23, 1983) (negligent inspection of a clay mine and failure to enforce mandatory safety standards required by the Mine Safety Act not within discretionary function exception); *Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (enforcement of safety regulations governing manufacturer of explosives not discretionary); *Loge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982) (no discretion to disregard mandatory regulatory commands governing licensing of polio vaccines); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (same); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (no discretion to disregard air traffic control regulations); *United Air Lines v. Wiener*, 335 F.2d 379, 394-95 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (no discretion to violate regulations concerning segregation of air traffic). *Cf. Hatahley v. United States*, 351 U.S. 173 (1956) (violation of livestock grazing regulations).

To be sure, the agency decision to issue regulations in the first place may be discretionary; and the same may be true of the agency determination as to what provisions the regulations should contain. *See, e.g., George v. United States*, 703 F.2d 90, 92 (4th Cir. 1983) (FAA failure to adopt a certain type of fuel system regulation); *Garbarino v. United States*, 666 F.2d 1061, 1065 (6th Cir. 1981) (FAA failure to adopt crashworthiness regulations). Once the regulations are in place, however, the discretion is at an end. As the Seventh Circuit recently

said in *Hylin*, *supra*, slip op. at ——: "[W]here . . . the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policymaking is not present." The government must implement its own regulations with reasonable care; it has no discretion to ignore, disregard or violate those regulations.

The dichotomy between developing regulations and executing them is amply supported by the text of the Tort Claims Act itself. Section 2680(a) provides:

> (a) Any claim based upon an act or omission of an employee of the Government, *exercising due care*, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(Emphasis added). This section on its face clearly immunizes two different types of conduct: (1) the execution of a statute or regulation while "exercising due care;" and (2) the performance of a discretionary function or duty. *See Hatahley v. United States*, 351 U.S. 173, 181 (1956). If section 2680(a) encompasses the *careless* execution of a regulation, as the government urges here, then the phrase "exercising due care" in the first prong of the section becomes superfluous. The government's interpretation therefore cannot be correct. The first prong of section 2680(a) was intended to prevent plaintiffs from using the Tort Claims Act to test the validity of properly executed statutes and regulations. *Dalehite v. United States*, 346 U.S. 15, 33 (1953). By inserting the phrase "exercising due care," Congress clearly manifested an intent that the immunity should not be preserved where the plaintiff accepts the validity of the statute or regulation and simply challenges the care with which the statute or regulation has been executed.

The second prong of section 2680(a) deals with discretionary functions, such as the "initiation of programs and activities," the establishment of "plans, specifications or schedules of operations," and other activities where "there is room for policy judgment and decision." *Dalehite v. United States, supra*, 346 U.S. at 35-36. Thus the second prong complements the first in that it also protects the development of regulations and policy choices concerning their contents. But the second prong does not address the government's liability for careless execution of regulations once they have been promulgated.[35]

In the present case, VARIG does not challenge the FAA's decision to promulgate its safety regulations in general or CAR 4b.381(d) in particular. Nor do we challenge the content of CAR 4b.381(d). Rather, VARIG's claim is based upon the FAA's complete lack of due care in implementing and executing this mandatory fire protection safety regulation with respect to the Boeing 707. The claim thus falls conceptually within the first prong of section 2680(a). We are dealing here with the execu-

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[35] The government argues that its broad reading of the discretionary function exception is supported by the legislative history of the Tort Claims Act because that exception in the final version of the Act eliminated earlier exemptions granted to the FCC and SEC. From this the government argues that the discretionary function exception was meant to bar " 'claims against Federal agencies growing out of their regulatory activities.' " Gov't Brief at 40. A review of the legislative history shows that the scope of the discretionary function exception was not intended to be as broad as the single snippet quoted by the government would suggest. In explaining the earlier exemptions for the FCC and SEC, the Special Assistant to the Attorney General noted that they were designed to preclude liability of the government should those agencies issue cease and desist orders which were later reversed by the courts. Not all regulatory activity was to be exempt, but only those activities requiring policy judgments which could be reversed later. *See A Bill To Provide for the Adjustment of Certain Claims Against the United States and To Confer Jurisdiction in Respect Thereto on the Court of Claims and the District Courts of the United States, and for Other Purposes: Hearings on S. 2690 Before a Subcomm. of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 48-49 (1940).

tion of a mandatory regulation—a regulation that the FAA allegedly executed *without* "exercising due care." The protective cloak of section 2680(a) is therefore unavailable to the government. Certainly the case does not invoke the second prong of section 2680(a). The establishment of programs, plans and specifications is not at issue here, nor did the FAA engineers and inspectors have room for policy judgment and decision in executing CAR 4b.381 (d). The FAA inspectors had *no* discretion to modify or disregard the regulations; they were simply charged with the mechanical, operational task of applying the regulations to the aircraft at hand. As FAA employee Rocco Lippis testified at his deposition, FAA regulations are "mandatory on . . . the certificating engineer," who is required to "check into every item" to ensure compliance. (Lippis deposition at 132, 37). This is not a discretionary function under the language of the Act or any of the relevant prior decisions of this Court or the lower courts.

The government does not appear to dispute these basic legal principles governing the Tort Claims Act and the discretionary function exception. Instead, the government makes a factual argument based on its conception of the FAA type certification process. The argument is divided into three main contentions: (1) that the FAA engages in a discretionary weighing of the "public interest" in deciding whether to issue a Type Certificate (Gov't Brief at 41-42); (2) that the application of the FARs during type certification of commercial aircraft calls for the exercise of subjective and predictive engineering judgment (Gov't Brief at 42-43); and (3) that prior to type certification the FAA cannot and does not check an aircraft type design for compliance with *all* FARs, but rather engages in a discretionary "spot check" for compliance (Gov't Brief at 43-46). Each of the government's contentions is wholly unsupported by the record evidence in this case and must be rejected.[36]

[36] The government also argues in passing that if the inspection had been performed by a DER, there could be no liability because

[Footnote continued on page 42]

First, there is no evidence that the FAA engages in any sort of delicate or judgmental weighing of the public interest in deciding whether a Type Certificate should be issued. To the contrary, 49 U.S.C. § 1423(a)(2) provides that if an aircraft design meets the FARs, the Type Certificate "shall" be issued. Congress has already made the public interest determination that Type Certificates shall be issued for aircraft that meet the FAA's

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[36] [Continued]

the negligence would not be that of a government employee. Gov't Brief at 37 n.36. This issue was not raised below or presented as a question in this Court. Moreover, the government admits that the evidence in this case is to the effect that the 707 was not reviewed for compliance with CAR 4b.381(d) by *anyone at all*—neither a DER nor an FAA engineer or inspector. If the review had been performed by a DER, that fact would be documented on an FAA form. (Nelson deposition at 728). No such form has ever been found (*Id.* at 731). Indeed, the certification checklist referring to CAR 4b.381(d) (J.A. 154-55) was an *FAA* form that should have been used by *FAA employee* Walter Spelman. (Curtiss deposition at 95-101). We also disagree with the government's legal conclusion that it cannot be held liable for DER negligence. The Manual of Procedure contradicts the government's argument. It states:

> TORT LIABILITY OF DESIGNATED ENGINEERING REPRESENTATIVES:
>
> A DER, while performing those duties which are part of his responsibilities as an agent of the Administrator, for all intents and purposes, becomes an employee of the Government and may incur liability for the United States if he is negligent. The basic standard in determining whether the United States will be responsible for his actions depends upon whether or not the individual was acting within the scope of his employment at the time of the alleged negligent act. In general, it may be said that, where the individual is furthering the interest of the Government and commits a negligent act at that time, the Government will be liable. Of course, there are limits and it should be noted that the Government will not be liable where the DER has clearly exceeded the limitations of his authority or has acted in a wanton manner and committed any one of the so-called "willful torts."

Manual of Procedure § .78.

safety regulations. No discretion is left to the FAA in that area.

Second, the testimony of the government employees in this case shows beyond any doubt that CAR 4b.381(d) is a clear and unequivocal mandatory fire protection safety regulation, that it can be applied without any subjective engineering judgments, and that the Boeing 707 waste container obviously violated the regulation. For example, the NTSB's Rudolf Kapustin testified that the noncompliance "needed no expert evaluation. It was a simple open and shut situation, that the compartment did not meet the requirements." (Kapustin deposition at 1597, J.A. 128). This was so because the waste paper compartment could not, "by any stretch of the imagination," be considered capable of containing fire. (*Id.* at 1625, J.A. 128).[37] Similarly, the FAA's Richard Nelson testified that in applying CAR 4b.381(d), "[t]here is no in between" because the compartment "either does or doesn't contain the fire." (Nelson deposition at 150, J.A. 130). The FAA's Rocco Lippis agreed, stating that CAR 4b.381(d) is "completely clear." (Lippis deposition at 200, J.A. 142). Thus CAR 4b.381(d) does not call for the exercise of scientific discretion, and section 2680(a) has no application.

Moreover, even if CAR 4b.381(d) did require the exercise of engineering or scientific judgment, the discretionary function exception still would not protect the government here. That exception applies only where there is room for *policy* judgment. *Dalehite v. United States*, *supra*, 346 U.S. at 36. It does *not* apply when the judgment concerns technical or scientific matters. *See, e.g., Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974); *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). CAR 4b.381(d) clearly does not call upon FAA

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[37] Indeed, the photographs and description of the sister ship teardown make it appear, even to a layman, as if the 707 waste paper area were designed to encourage and propagate fire, rather than contain it. See *supra*, p. 3-8.

engineers to make policy judgments, and section 2680(a) therefore does not apply.[38]

We turn finally to the government's "spot check" theory of aircraft certification. As noted above, this is a new argument never made in the courts below; and it cannot properly be advanced here for the first time. Beyond that, the argument is inconsistent with the facts in the record. The government relies on two FAA Handbooks, recently lodged with the Clerk of this Court, neither of which was in existence at the time the Boeing 707 was type certificated and one of which does not even deal with the type certification process. *See* FAA Handbooks 8110.4 and 8130.2B. The Manual of Procedure which was applicable to the type certification of the Boeing 707 does not support the government's argument that FAA engineers and inspectors may "spot check" the type design of a new aircraft and issue a Type Certificate even if the design does not comply with all of the applicable regulations. That Manual states that a Type Certificate will be issued only "after . . . the CAA has verified that *all* applicable airworthiness requirements are met. . . ." Manual of Procedure at 2 (emphasis added). Furthermore, although the Manual permits FAA engineers to check less than all the *data* submitted by the applicant, it gives them no discretion to review *no data at all* and issue a Type Certificate when the design fails to comply with a regulation because of that failure to review. In fact, the Manual specifically requires the FAA engineers to examine sufficient data "to ascertain that the design complies with the minimum airworthiness requirements." Manual of Procedure at 12.

The government's argument that Handbook 8110.4 permits FAA manufacturing inspectors to "spot check" air-

[38] Physicians and psychiatrists routinely exercise scientific and professional judgment in treating patients. Yet this is not *policy* judgment, and it is invariably held that they do not perform a discretionary function. *See, e.g., Jablonski By Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983); *Hitchcock v. United States*, 665 F.2d 354, 362-64 (D.C. Cir. 1981); *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980); *Jackson v. Kelly*, 557 F.2d 735, 738 (10th Cir. 1977).

craft type designs and issue Type Certificates for designs that comply with less than all the regulations (Gov't Brief at 44) is supported by neither that Handbook nor the Manual of Procedure. Both documents state that: "Regardless of the manufacturer's experience, it is the FAA inspector's responsibility to assure that a complete conformity inspection has been performed by the manufacturer and that the results of this inspection are properly recorded and reported." Manual of Procedure at 11-2; FAA Handbook 8110.4 at 40. In the area of fire protection, Handbook 8110.4 explicitly directs the FAA engineers to verify compliance with *all* regulations:

> 103. *Fire Protection Systems.* Ascertain that *all* accessories and components comply with applicable regulations and TSO requirements (where applicable). Check suitability of equipment with respect to probable types of fires. (Class A, B, or C fires.) Check adequacy of detail installation design. Ascertain that all materials, structural and nonstructural, comply with the applicable flame-resistant requirements. Ascertain that cargo compartments are correctly classified. (Class A, B, C, D, or E.)

FAA Handbook 8110.4 at 83 (emphasis added). Mr. Nelson testified that this section of Handbook 8110.4 requires FAA engineers to check lavatory waste containers for compliance with CAR 4b.381(d) and that any deviation from the regulation would require "clearance from Washington." (Nelson deposition at 482-85).

The directive in the Manual of Procedure that FAA engineers are required to ascertain that a type design complies with *all* of the applicable regulations before a Type Certificate can issue was confirmed by the testimony of all the FAA employees deposed in the *Varig* case. Mr. Nelson testified that an aircraft design *must* comply with CAR 4b.381(d) in order to receive a Type Certificate. (Nelson deposition at 150, J.A. 131). Mr. Lippis testified that FAA regulations are "mandatory on . . . the certificating engineer" and "must be complied with." (Lippis deposition at 132-33). The FAA engineers are charged

with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81, J.A. 139-40). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*) Certainly the certification checklist used by FAA engineers (J.A. 154-55) does not suggest that they may ignore regulations at their discretion. To the contrary, it specifically requires verification of compliance with CAR 4b.381(d).

There is, in short, no evidence to support the government's "spot check" defense in the context of the initial type certification of a new commercial aircraft design.[39] Indeed, it is inconceivable that a low-level FAA certificating engineer could properly take it upon himself to ignore a regulation entirely and allow a complete aircraft component or system to pass without review of any sort by anyone at any time. Yet that is the gist of the government's argument here.[40] There is no such discretion on

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[39] The government also relies upon a 1980 study by the National Academy of Sciences entitled *Improving Aircraft Safety*. This study is not in the record and cannot properly be used to impeach the evidence that is in the record here. In any event, the study actually supports our position when it states (at 29) that the FAA "must be certain that the design for a new airplane meets *all* the regulatory requirements" (emphasis added).

[40] The reports resulting from congressional review of the FAA's type certification process show that Congress does not agree with the government's "spot check" theory of enforcement of regulations. One House subcommittee has emphasized that "the FAA must resist any . . . pressures to shortcut its procedures." Selected Review at 149. In the same report, the subcommittee criticized the FAA for failure to maintain its "traditionally . . . high degree of regulatory activity designed to require and achieve the highest degree of safety possible," and for an "erosion in the agency's traditional insistence on excellence and attention to detail." *Id.* at 195. Similarly, the House Committee on Government Operations has

[Footnote continued on page 47]

the part of the FAA engineers and inspectors, and none can be manufactured for purposes of this case.

III. THE MISREPRESENTATION EXCEPTION DOES NOT BAR VARIG'S CLAIMS

The government raised the misrepresentation exception, 28 U.S.C. § 2680(h), in its Petition for Certiorari before this Court issued its opinion in *Block v. Neal*, 103 S. Ct. 1089 (March 7, 1983). In light of the *Block* decision, we are surprised that the government persists in its misrepresentation argument.[41] *Block* is on all fours with the present case, and it compels affirmance of the court of appeals' holding that VARIG's claims are not barred by the misrepresentation exception.

In *Block v. Neal*, the plaintiff alleged that the Farmers Home Administration ("FmHA") had negligently inspected and supervised construction of her house. The house was being constructed for the plaintiff by a builder named Home Marketing Associates, Inc. FmHA inspected the construction work on three occasions and ultimately issued a final report stating that the construction was in accord with all the applicable drawings and specifications, which had been previously approved by FmHA. After the

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[40] [Continued]

declared that "[t]he highest possible level of safety certainly cannot be achieved with even slightly defective aircraft." Critique at 6. With respect to the FAA's regulation concerning lavatory sink units in particular, it is interesting that the current FAA Administrator testifying recently before Congress in connection with a recent in-flight aircraft fire argued that smoke detectors in lavatories are not necessary because waste receptacles "are designed so if there is a fire in there . . . they will burn themselves out and be contained." *Aircraft Maintenance and Fire: Hearing Before the Subcomm. on Transportation, Aviation, and Materials of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 54 (1983).

[41] It is ironic that in its Petition for Certiorari, filed while *Block v. Neal* was under submission, the government asserted that *Block* would "have a substantial bearing on the applicability of the misrepresentation exception to this suit." Petition for Certiorari in No. 82-1350, at 22. Now that the government has seen the opinion in *Block*, it attempts to distinguish the case.

plaintiff moved into her house, she discovered a faulty heat pump and thirteen other construction defects. Some of the defects constituted deviations from the approved drawings and specifications. The plaintiff was unable to obtain satisfaction from Home Marketing and thereafter brought a Tort Claims Act case against the United States.

The Sixth Circuit held that the plaintiff's claim was not barred by the misrepresentation exception, and this Court agreed. Distinguishing *United States v. Neustadt*, 366 U.S. 696 (1961), the Court held that the plaintiff's claim was based primarily on FmHA's negligent inspection and supervision of construction of the house and not on the misstatements that may incidentally have appeared in FmHA's final report. In *Neustadt*, the plaintiff simply paid too much for a house in reliance on an erroneous government appraisal; he alleged "no injury that he would have suffered independently of his reliance on the erroneous appraisal." 103 S. Ct. at 1093. In *Block*, by contrast, the plaintiff did suffer such an independent injury. Regardless of FmHA's final report, the plaintiff would have been injured by the defects in her house that should have been prevented by the government's inspection. As the Court explained:

> Neal's factual allegations would be consistent with proof at trial that Home Marketing would never have turned the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.

103 S. Ct. at 1094.

In addition, the Court pointed out that the misrepresentation exception generally applies only to invasions of financial or commercial interests in the course of business dealings, not to the sort of property damage claims exemplified by the *Indian Towing* case. *See* 103 S. Ct. at 1093 n.5.

The present case falls squarely within the rationale of *Block v. Neal*, and the misrepresentation exception is therefore inapplicable.[42] VARIG's claim is not based upon FAA misstatements contained in the Boeing 707 Type Certificate or anywhere else. VARIG alleges, rather, that the FAA was negligent in reviewing and inspecting the design of the Boeing 707 and negligent in failing to require Boeing to comply with the applicable safety regulations, such as CAR 4b.381(d). *See* VARIG's First Amended Complaint ¶¶ 7, 13 (J.A. 18, 20). If the FAA had not been negligent, it would have required Boeing to comply with CAR 4b.381(d) and would not have permitted the 707 to operate in its defective condition. VARIG suffered property damage that is wholly independent of the misstatements made by the FAA in the Type Certificate. Its 707 aircraft was destroyed as a result of defects that should have been discovered and corrected by the FAA. Moreover, we are dealing here with property damage like that in *Indian Towing*, not the invasion of financial or commercial interests in the course of business dealings.

Thus, the parallel between this case and *Block v. Neal* is complete; this case cannot be reversed without overruling *Block v. Neal*. The government makes a half-hearted attempt to avoid *Block* by suggesting that FmHA's undertaking to supervise construction of the plaintiff's house was the key distinguishing factor in that case. Gov't Brief at 49.[43] Yet in *Block*, the plaintiff alleged that FmHA was negligent in both inspecting and supervising construction of the house. *See* 103 S. Ct. at 1090. There is no indication from the Court's opinion

[42] For a recent application of *Block v. Neal* consistent with our views, see *Cross Bros. Meat Packers, Inc. v. United States*, 705 F.2d 682 (3d Cir. 1983).

[43] The government also cites Illustration 8 of § 311 of the *Restatement (Second) of Torts*. Gov't Brief at 47-48. This is the same Illustration that it cited—unsuccessfully—in *Block v. Neal*. Brief for the United States in *Block v. Neal*, at 17 & n.8 (August 1982). The Illustration is no more persuasive here than it was in *Block*.

that supervision of construction was the decisive factor. In addition, the FmHA in *Block* did no more to "supervise" construction of the plaintiff's house than the FAA did to "supervise" design of the 707. In both cases, the government inspected a private party's product to ensure that it was properly produced in accordance with approved plans and specifications. Again, the parallel with *Block* is complete; and there is no principled basis for departing now from the *Block* decision.

Finally, the government makes the curious contention that under *Block* only Boeing—not VARIG—should be permitted to recover for the FAA's negligence in certificating the 707. Gov't Brief at 50. This argument really seems more appropriate for the opening section of the government's brief; it has little to do with the misrepresentation exception. In any event, the government again ignores the actual facts of *Block*. The government in *Block* inspected the manufacturer's product, and the unrelated customer was permitted to recover. The result is the same here. The FAA negligently inspected the manufacturer's product (the Boeing 707), and the customer (VARIG) is entitled to recover. Once more, *Block v. Neal* requires affirmance of this case.

CONCLUSION

For all the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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